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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1815

CECIL D. ANDRUS, Secretary of the Interior,
PETITIONER

v.

SHELL OIL COMPANY AND D. A. SHALE, INC.

Brief of State of Utah as Amicus Curiae

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II. STATUTES CITED:

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I. INTEREST OF STATE OF UTAH AS AMICUS CURIAE

Utah owns certain lands containing oil shale deposits, and has also selected 157,000 acres of the public domain in Utah, believed to contain oil shale deposits, as school indemnity lands. This Court has granted certiorari to review the legal effect of these school indemnity selections in *Andrus v. State of Utah,* U.S.S.C. No. 78-1522 (October Term, 1978).

The state-owned lands and the school indemnity selections are, for the most part, blanketed by old oil shale placer claims. If those claims are determined valid, Utah will have little or no proprietary interest in the oil shale resource. If, on the other hand, it is determined that these pre-1920 claims were not located pursuant to discovery of a valuable mineral deposit within the meaning of the general mining laws, Utah's proprietary interest in this resource will be protected.

II. QUESTION PRESENTED

Whether Congress, through inaction, has amended the general mining laws to exempt oil shale mining claims from the discovery requirements of the general mining laws.

III. INTRODUCTION

The Secretary of the Interior, through the Solicitor General, has petitioned this Court for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review that court's opinion, reported at 591 F.2d 597 and appended to the Secretary's petition at pp. 1a-20a.

Utah filed an *amicus curiae* brief in the circuit court in support of the position advocated by the Secretary, and now files this brief in support of the Secretary's petition for a writ of certiorari.

The Mineral Leasing Act of February 25, 1920, ch. 85, 41 Stat. 437, 30 U.S.C. 181 *et seq.*, withdrew certain minerals, including oil shale, from location under the general mining laws and made them subject to disposition only through leasing. However, shortly before the Mineral Leasing Act was passed, there was a great deal of interest in oil shale potential, and a great number of placer claims were filed in Colorado, Utah and Wyoming[1]. Claims filed before the effective date of the leasing act could be main-

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[1] In *Hickel v. Oil Shale Corp.*, 400 U.S. 48, 54 (1970), the court provided the following explanation:

> It appears that shortly before 1920 oil shale claims were affected by a speculative fever. Then came a period of calm. By the late forties and continuing into the sixties speculators sought out the original locators or their heirs, obtained quit-claim deeds from them, and thereupon eliminated all other record title-holders by performing assessment work for one year. It appears that 94 of the 98 claims involved in the present litigation were of that character. There is nothing reprehensible in the practice, if the procedure is one which Congress has approved.

tained and perfected in accordance with the laws under which they were initiated. 30 U.S.C. 193.

For approximately forty years the Department of Interior followed the administrative decision in *Freeman v. Summers,* 52 L.D. 201 (1927), which held, in effect, that oil shale deposits constituted an "enormously valuable resource for future use" and they were therefore valuable mineral deposits so as to constitute valid discovery under the general mining laws, even though at the time of location a prudent man would have known that there was no reasonable prospect for present mining and marketing of oil shale at a profit. The prospect for profitable extraction was speculative and dependent upon future technology and market conditions.

The genesis of this litigation was in 1964 when the Secretary initiated administrative proceedings contesting the validity of certain oil shale placer claims on the ground, *inter alia,* that there had been no valid discovery. Without detailing all of the events which transpired between then and now, it is sufficient to say that the court below conceded that the oil shale placer claims did not meet the discovery requirements of the general mining laws as applied to other minerals, but that, nevertheless, congressional awareness of the Department's forty-year practice was effective to amend the general mining laws, without amendatory legislation, to carve out a special exemption for oil shale placer claims.

IV. REASON FOR GRANTING THE WRIT

A. *No Judicial Precedent for Amendment of Statutes Through Congressional Inaction*

The decision of the court below is without precedent in holding that congressional *awareness* of an erroneous

administrative interpretation of a statute may actually *amend* the statute to conform with the administrative interpretation. No other case, to our knowledge, has held that statutes may be amended by congressional inaction.

This is not a matter of judicial deference to a reasonable administrative interpretation of an ambiguous statute. Nor is it a matter of judicial recognition of congressional acquiescence in an administrative interpretation of a statute as a guide to the interpretation originally intended by Congress. No, it plainly and simply is a matter of the lower court declaring that Congress can amend legislation without amendatory legislation.

The lower court's rationale is easily illustrated by brief extracts from the opinion. First, the court frankly acknowledged that the "discovery" test historically used by the Interior Department to determine the validity of oil shale placer claims was contrary to the mining laws:

> Under the mining laws, Act of July 4, 1866, Act of May 10, 1872, and Act of June 22, 1874, now generally 30 U.S.C. §22, public lands of the United States not withdrawn from entry and containing valuable mineral deposits are open for location with some exceptions not here concerned. Nonmineral entries cannot be made on public lands deemed valuable for minerals. 30 U.S.C. §23 relates to lode claims and §35 provides that placer claims should be located under like circumstances and conditions and upon similar proceedings as are provided for lode claims. For lode claims there must be a discovery of a vein or lode and also a discovery of a valuable mineral deposit. For a placer claim there need only be a discovery of a valuable mineral deposit. We are here concerned with placer claims located for oil shale before the Mineral Leasing Act of 1930, 30 U.S.C. §181.

> *Everything considered, it must be concluded that the "valuable mineral deposit" standard or requirement was not met as to oil shale claims of the type here considered before 1920 as the standards were applied to the metallic minerals.* (Secretary's Petition, p.3a; emphasis added).

After reviewing various events which revealed that Congress was aware of the Interior Department's administrative treatment of oil shale mining claims in a manner not authorized by existing mining laws, the lower court said this "unique situation" caused the Department's practice to "become part of the mining laws and properly so."

> Thus we have what appears to be a unique situation where Congress made an intense investigation into Interior's interpretation of the mining laws as to a very specific and narrow circumstance, and approved it. This indeed bears no resemblance to the many Congressional silence cases, and removes any uncertainty as to whether the matter actually received attention, and also constitutes an express determination that the practice had indeed become part of the mining laws and properly so. (Secretary's Petition, p. 12a).

The lower court then flirted repeatedly with the "congressional reenactment" doctrine, sometimes distinguishing it and sometimes relying on it. The following quotations illustrate this waffling:

> We must hold that the Department is not free to so change the application of the general mining laws as to the oil shale locations here under consideration. The different treatment afforded all oil shale claims as to the "valuable mineral deposit" element of a location became a part of the general mining laws by reason of its adoption and approval by both Houses of Congress during the intensive investigations of this

very question and their affirmative resolution of the issue. The general mining laws were thus adjusted to accommodate the then very important practical and legal problem.

We do not put this in the category of Congressional reenactment after an administrative interpretation. There are, of course, a large number of cases in a variety of circumstances which relate to reenactments. As indicated, we are of the view that the circumstances here present take the case far beyond the doctrine set forth in these cases, and into something quite different, but they demonstrate the variety of circumstances and show the firm basis for the presumptions arising from reenactment alone. (Secretary's Petition, p. 17a).

Instead of reenactment, and silence on the issue, as an acceptance of interpretation, we regard the events hereinabove described as an affirmative adoption of the very basic application of the mining laws to make it part of the statutory method for development of the oil shale reserves. (Secretary's Petition, p. 18a).

This is no more than an application of the doctrine developed over the years in the reenactment cases but in the presence of the added significant element described above at some length,—the extensive participation by Congress in the specific issue. (Secretary's Petition, p. 18a).

Then, in final summary, the lower court concluded:

The combination of circumstances we have before us presents a unique situation which, as we have said above, constituted an addendum to the mining law which cannot be removed short of Congressional action. It is simply an application of the doctrine arising in the reenactment cases referred to above with special emphasis on the added element of affirmative action by Congress. The affirmative action by Congress on the point here is overwhelming. (Secretary's Petition, p. 20a).

The "affirmative action" of Congress relied on by the lower court really was nothing more than a failure by Congress to take any action at all to amend the mining laws when it knew that the Interior Department was treating oil shale claims as valid even though there had been no discovery of a "valuable mineral deposit" within the meaning of the mining laws.

The lower court's decision is a very dangerous judicial precedent which penetrates the government's separation of powers and invites statutory amendments through nothing more than erroneous administrative interpretations of statutes coupled with judicial complicity. Congress really doesn't get into the act at all in any constitutional sense. For that reason alone, the lower court's decision would deserve review by this Court.

B. *Propriety of Departmental Correction of Earlier Erroneous Administrative Interpretation of Statute*

The Department of Interior should not only be permitted — but should be obliged — to correct prior erroneous administrative interpretations of statutes. A case which is remarkably similar (except for the result) to the case at bar is *United States v. Imperial Irrigation District,* 559 F.2d 509 (9th Circ., 1977), wherein it was held that an earlier Secretary of the Interior's administrative interpretation of the excess lands provision (160-acre limitation) of the Omnibus Adjustment Act of 1926 was not binding or controlling on a later Secretary or on the courts, if the earlier interpretation was in error. The lower court (322 F. Supp. 11) had held that an administrative decision of Secretary of the Interior Ray Lyman Wilbur, issued February 24, 1933, was binding on the court because (1) it had been followed consistently for nearly forty years, (2) the

legislative history of the Omnibus Adjustment Act of 1926 supported the Secretary's opinion, (3) Congress repeatedly had been made aware of the Secretary's opinion and seemingly acquiesced in it, and (4) very substantial investments had been made by private parties in reliance on the Secretary's opinion.

Those facts and contentions were set forth in considerable detail at 322 F.Supp. 15-27. A careful review of those facts will demonstrate that there was genuine, active and repeated congressional acquiescence in the administrative interpretation. Nevertheless, the Ninth Circuit Court held that the Secretary's interpretation in 1933, and the administrative practice since that date, constituted an incorrect interpretation of the law and would not be followed by the court:

> . . . The appropriate deference to be accorded an administrative construction of a statute is that a 'consistent and longstanding' interpretation of a Congressional enactment by an agency charged with administration of that statute is entitled to 'considerable weight' but it does not control the decisions of the courts. *United States v. National Association of Securities Dealers,* 422 U.S. 694, 719, 95 S.Ct. 2427, 45 L.Ed. 2d 486 (1975). The ultimate responsibility of interpreting the language of Congress resides in the courts. *Zuber v. Allen,* 396 U.S. 168, 193, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969). (599 F.2d 509 at 539).

In *Imperial,* a later Secretary of the Interior had determined that a forty-year-old administrative opinion of a predecessor Secretary and the department practice in accordance therewith were in error and should be reversed, but the trial court said that the later Secretary of the Interior could not change the administrative interpretation adopted by the earlier Secretary. The Court of Appeals for the

Ninth Circuit reversed on appeal, saying that the later Secretary not only could, but must, correct the erroneous interpretation and practice. That decision is clearly sound, contrasted with the decision of the Tenth Circuit in this case.

V. CONCLUSION

It is respectfully submitted that a writ of certiorari should be granted in accordance with the Secretary's petition.

Dated this 10th day of July, 1979.

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CERTIFICATE OF SERVICE

I, Robert B. Hansen, Attorney General of, and counsel for, the State of Utah, and a member of the Bar of this Court, do hereby certify that three copies of the foregoing Brief of the State of Utah as *Amicus Curiae* were served upon each of the following by mailing the same, postage prepaid, this 10th day of June, 1979, all in accordance with the Rules of this Court

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